IN THE

Supreme Court of the United States

October Term, 1971

No. ~~421~~ 71-421

TEXAS GULF SULPHUR COMPANY and CHARLES F. FOGARTY,
Petitioners,

v.

WALTER A. MITCHELL,
Respondent.

TEXAS GULF SULPHUR COMPANY and CHARLES F. FOGARTY,
Petitioners,

v.

GEORGE GORDON REYNOLDS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

ORISON S. MARDEN
14 Wall Street
New York, New York 10005
Attorney for Petitioners

CALVIN A. BEHLE
KEITH E. TAYLOR
PARSONS, BEHLE & LATIMER, Esqs.

P. B. KONRAD KNAKE
THOMAS MCGANNEY
JEFFREY A. BARIST
W. NEIL THOMAS, III
WHITE & CASE, Esqs.
Of Counsel

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PETITION FOR REHEARING

Petitioners respectfully move this Court for an order (1) vacating its denial of their petition for certiorari, entered on December 20, 1971, and (2) granting the petition. In support of this motion, petitioners state the following:

I

This petition may be considered by the full Court of nine Justices.

The petition for certiorari was denied on December 20, 1971, with Justices Stewart and Blackmun dissenting. At the same time, petitions were also denied in *SEC* v. *Texas Gulf,* Docket Nos. 327, 328, 346 and 347. Petitions for rehearing are also being filed in those cases. Since that time, two new Justices have become members of this Court.*

There is pending before this Court a petition by George Gordon Reynolds and Walter A. Mitchell arising from this same case. (Docket No. 693) That petition will be considered by the full Court, and we respectfully submit that the instant petition and the underlying petition for certiorari should be considered by the full Court at the same time.

There can be no question of the importance of the questions presented in this case and in the *SEC* case and of their significance for the future administration of the securities laws.

It is respectfully urged that the entire Court consider the issues presented by the petition for certiorari. The issues are of first impression and of great public importance. In addition, we submit the following additional reason for review.

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* While Rule 58(1) of this Court provides that a petition for rehearing of judgments or decisions other than those denying or granting certiorari "will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the Court," no such restriction appears in subdivision (2) relating to petitions for rehearing of denial of certiorari. Similarly, the practice for new Justices not to participate in the consideration of a petition for rehearing after a decision on the merits would not seem to apply to the consideration of a petition for rehearing of denial of certiorari. *Cf.* STERN & GRESSMAN, SUPREME COURT PRACTICE §§15.6 and 15.7 (4th ed. 1969).

II

The commencement of a new class action and the settlement of other private litigation arising out of the facts of this case forcefully demonstrate the importance of review by this Court of the rules governing disclosure under the securities laws.

Since the date of the denial of the petition for certiorari, two significant intervening events have occurred to which petitioners would like to draw the attention of this Court:

1. On December 30, 1971, there was filed in the Southern District of New York an Agreement of Compromise and Settlement which proposed a settlement of the bulk of the Texas Gulf private litigation pending in that court and in the New York state court.*

2. On January 11, 1972, an action entitled *Fox* v. *Texas Gulf Sulphur Company* (Civil No. C-1872) was filed in the District of Utah, with respondents' attorney appearing as attorneys for plaintiff there. This is an alleged class action brought by a person who claims to have sold 40 shares of Texas Gulf stock in reliance upon the April 12 press release, but after the second (April 16) press release announcing a major ore discovery had appeared on the Dow-Jones broad tape and had been received in every brokerage office in the country. Plaintiff seeks recovery of at least $10,000,000 for himself and for members of the alleged class, which is defined to include: (1) all sellers on April 16 after 10:55 A.M., when the Dow-Jones broad tape carried

* This proposed settlement is referred to in the Reply Brief (p. 4) filed by the petitioners in *Reynolds and Mitchell* v. *Texas Gulf Sulphur*, Docket No. 693, which is to be considered by the entire Court.

the second Texas Gulf press release, and (2) all sellers on April 17, 1964, or "until such later time as public investors in such stock had a reasonable opportunity to acquaint themselves with and act upon the information contained in the April 16, 1964 press release of TGS."

These two events in juxtaposition demonstrate the hazard to which the management and shareholders of a publicly held company may be subject for an innocent act under the rules of law announced by the courts below. The operative terms of the proposed settlement call for the payment in escrow of $2.7 million by Texas Gulf. Of this amount, $2.2 million is allocated for payment of the claims asserted in a class action on behalf of those who claim to have sold Texas Gulf stock in reliance upon the April 12 press release prior to the time that the second release announced the Timmins discovery. A hearing is scheduled for March 9, 1972 to determine whether this settlement should be approved.

Despite this settlement (which does not encompass the present action or the *Fox* action) petitioners are still being subjected to huge claims of damages based on the April 12 release. There were approximately 325,000 shares of Texas Gulf stock sold on April 16 after 10:55 A.M., and approximately 500,000 shares sold on April 17. Recovery is sought in the new alleged class action on behalf of twice again as large a class as the actions just settled. As pointed out in the petition herein (pp. 23-26), the Tenth Circuit refused to limit liability emanating from the April 12 release to those who sold prior to the time (10:55 A.M. on April 16) that petitioners' second release became available in every brokerage house in the country. The filing of the alleged

class action at this time underlines the importance of review of both the measure of recovery and the period of damage exposure announced by the Tenth Circuit, as well as the new underlying theories of that decision.

The decisions below, upon which plaintiff Fox will undoubtedly rely, ordered Texas Gulf to pay damages on the basis of a record which contained not a shred of evidence of conscious wrongdoing by Texas Gulf.* Not only was Texas Gulf not benefited in any way by the release, but there was not even a theory advanced as to how the release could have been monetarily beneficial to Texas Gulf. Despite this, innocent shareholders who held or bought Texas Gulf shares were required to pay to selling stockholders additional "profits" those sellers might have made had they not sold their shares at the particular time.

The basic issue below was whether Texas Gulf had a legal duty to say more than it did when it issued a wait-and-see statement on April 12, 1964. This issue was resolved without the benefit of any statute or SEC regulation prescribing standards for voluntary public statements in response to false and exaggerated rumors. If every statement issued by a publicly-held company is to be subjected to *ex post facto* judicial scrutiny befitting a prospectus, and if liability for failure to pass this scrutiny extends to the world of buyers and sellers of such securities for an indefinite period of time, that is a matter of grave importance for the shareholders and management of such

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* It is noteworthy that respondents' answering brief did not question petitioners' statement that the record contains no evidence upon which a finding of intent to deceive could be based.

companies. Rather than countenance the establishment of new doctrine through the traumatic process of novel judicial interpretation of a statute enacted in 1934 and of long standing administrative regulations, this Court should urge those who seek to impose new duties on corporate management to utilize the procedures provided for rule making and legislation. See *Reliance Electric Company* v. *Emerson Electric Company,* 40 U.S.L.W. 4125 (U.S. Jan. 11, 1972).

Petitioners respectfully submit that the above described events give concrete support to the concerns previously voiced by petitioners. It should be for this Court to determine whether the Congressional purpose is furthered by decisions which, by imposing exacting *ex post facto* standards and extending damage exposure to thousands upon thousands of investors, discourage good faith disclosure and bring about "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers * * *." *Securities and Exchange Commission* v. *Texas Gulf Sulphur Company,* 401 F.2d 833 at 867 (2d Cir. 1968) (Friendly, J. concurring).

Conclusion

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari in this action and in the companion petitions in Nos. 327, 328, 346 and 347, petitioners pray that this Court grant rehearing of the

order of denial and grant review of the judgment and opinion below.

Dated: January 14, 1972

Respectfully submitted,

ORISON S. MARDEN
Attorney for Petitioners

CALVIN A. BEHLE
KEITH E. TAYLOR
PARSONS, BEHLE & LATIMER, Esqs.

P. B. KONRAD KNAKE
THOMAS MCGANNEY
JEFFREY A. BARIST
W. NEIL THOMAS, III
WHITE & CASE, Esqs.
Of Counsel

Certificate of Counsel

As counsel for the petitioners, I hereby certify that the petition for rehearing is presented in good faith and not for delay, and as described above, is restricted to the grounds specified in Rule 58(2).

/s/ ORISON S. MARDEN

ORISON S. MARDEN
Attorney for Petitioners